

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF OREGON  
 PORTLAND DIVISION

BILLY RICHARDSON,	)	
	)	
Plaintiff,	)	
	)	No. CV-08-6082-HU
v.	)	
	)	
COUNTY OF LINN, OR, STATE OF	)	
OREGON,	)	FINDINGS & RECOMMENDATION
	)	
Defendants.	)	
_____	)	

Billy Richardson  
 6605575  
 Santiam Correctional Institution  
 4005 Aumsville Highway SE  
 Salem, Oregon 97317

Plaintiff Pro Se

Starla J. Goff  
 SMITH FREED EBERHARD PC  
 111 S.W. Fifth Avenue, Suite 4300  
 Portland, Oregon 97204

Attorney for Defendant Linn County

HUBEL, Magistrate Judge:

Pro se plaintiff Billy Richardson brings this 42 U.S.C. § 1983  
 action against defendant Linn County, alleging a violation of his

1 - FINDINGS & RECOMMENDATION

1 First Amendment rights.<sup>1</sup> Both parties move for summary judgment.  
2 For the reasons explained below, I recommend that plaintiff's  
3 motion be granted in part and denied in part, and that defendant's  
4 motion be granted in part and denied in part.

5 BACKGROUND

6 On May 25, 2007, plaintiff was arraigned in Linn County on  
7 criminal charges. At the time, attorney David Delsman was  
8 appointed counsel for plaintiff. Plaintiff was incarcerated at the  
9 Linn County Jail. Delsman remained plaintiff's counsel in  
10 connection with the criminal charges until approximately August 21,  
11 2007, a few days before plaintiff's release from the Linn County  
12 Jail on August 24, 2007.

13 On September 26, 2007, William L. Ghiorso began representing  
14 plaintiff on the criminal charges. On January 22, 2008, Ghiorso  
15 withdrew as counsel. Plaintiff returned to the Linn County Jail on  
16 February 1, 2008, and Kirk Tibbetts was appointed as plaintiff's  
17 counsel on that date. On February 28, 2008, Janet Boytano was  
18 substituted for Tibbetts and was appointed to represent plaintiff.

19 During his initial incarceration at the Linn County Jail, from  
20 May 25, 2007, until August 24, 2007, plaintiff was in contact with  
21 Jeffrey Sharp, whom plaintiff describes as a "non-attorney who for  
22 personal reasons has taken an interest in the legal plight of the  
23 indigent 'actually innocent.'" Pltf's CSF at ¶ 9. Plaintiff's  
24 undisputed description of Sharp's work is that Sharp "does not  
25 charge for services nor claim special legal skills but will do

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26  
27 <sup>1</sup> Plaintiff named the State of Oregon in his original  
28 Complaint, but dropped the State in his Second Amended Complaint  
filed June 16, 2008.

1 'legwork' investigations in the local underworld then provide such  
2 information to attorneys." Id.

3 Plaintiff met with Sharp in early July 2007 and requested that  
4 Sharp contact potential defense witnesses listed by plaintiff and  
5 obtain statements from them. He contends that Delsman, his court-  
6 appointed attorney at the time, had not done this. Plaintiff and  
7 Sharp also discussed plaintiff's rights to pre-trial discovery and  
8 to effective attorney representation. According to plaintiff,  
9 because Sharp was not an attorney, Sharp planned to send plaintiff  
10 copies of "authoritative caselaw" on these issues.

11 Following the meeting, Sharp obtained sworn statements from  
12 most of the witnesses named by plaintiff. Plaintiff states that  
13 these affidavits were filed with the court, and sent to Delsman and  
14 the State. Copies were also sent to plaintiff in the Linn County  
15 Jail. Sharp also mailed Delsman and plaintiff copies of cases, and  
16 "other court filings" that plaintiff states may have been helpful  
17 to his case.

18 These mailings from Sharp to plaintiff while he was  
19 incarcerated in the Linn County Jail were confiscated by jail staff  
20 and returned to Sharp. Some were returned because they related to  
21 the alleged victim in plaintiff's criminal case and violated the  
22 jail's policy prohibiting delivery of mail related to a victim or  
23 a victim's family. Other documents were returned based on  
24 defendant's policy that legal-related mail must be sent by the  
25 inmate's counsel.

26 Towards the end of August, about one week after Delsman was no  
27 longer representing plaintiff, Delsman supplied the jail with the  
28 materials that Sharp had sent. The jail then provided the

1 documents to plaintiff.

2 On February 17, 2009, while still incarcerated at the Linn  
3 County Jail, plaintiff requested the services of a free notary.  
4 Exh. 2 to Tim Mueller Declr. at p. 1. The request was denied,  
5 although plaintiff was told that he could have a notary come into  
6 the jail "pretty much anytime." Id. Mueller, the Linn County  
7 Sheriff, states that on the date plaintiff requested the free  
8 notary, plaintiff had funds to pay for the service. Mueller Declr.  
9 at ¶ 4. Plaintiff's commissary report from the jail shows what  
10 appears to be a \$220 deposit on February 9, 2009, and a positive  
11 balance remaining as of February 17, 2009. Id. at p. 2.

12 Finally, plaintiff agrees that he did not request access to a  
13 law library during a time that he was unrepresented by counsel.

#### 14 STANDARDS

15 Summary judgment is appropriate if there is no genuine issue  
16 of material fact and the moving party is entitled to judgment as a  
17 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the  
18 initial responsibility of informing the court of the basis of its  
19 motion, and identifying those portions of "'pleadings, depositions,  
20 answers to interrogatories, and admissions on file, together with  
21 the affidavits, if any,' which it believes demonstrate the absence  
22 of a genuine issue of material fact." Celotex Corp. v. Catrett,  
23 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

24 "If the moving party meets its initial burden of showing 'the  
25 absence of a material and triable issue of fact,' 'the burden then  
26 moves to the opposing party, who must present significant probative  
27 evidence tending to support its claim or defense.'" Intel Corp. v.  
28 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)

1 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th  
2 Cir. 1987)). The nonmoving party must go beyond the pleadings and  
3 designate facts showing an issue for trial. Celotex, 477 U.S. at  
4 322-23.

5 The substantive law governing a claim determines whether a  
6 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors  
7 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as  
8 to the existence of a genuine issue of fact must be resolved  
9 against the moving party. Matsushita Elec. Indus. Co. v. Zenith  
10 Radio, 475 U.S. 574, 587 (1986). The court should view inferences  
11 drawn from the facts in the light most favorable to the nonmoving  
12 party. T.W. Elec. Serv., 809 F.2d at 630-31.

13 If the factual context makes the nonmoving party's claim as to  
14 the existence of a material issue of fact implausible, that party  
15 must come forward with more persuasive evidence to support his  
16 claim than would otherwise be necessary. Id.; In re Agricultural  
17 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);  
18 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,  
19 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

#### 20 DISCUSSION

21 Plaintiff's Second Amended Complaint raises four causes of  
22 action: (1) defendant violated his First Amendment rights when it  
23 confiscated the mailings from Sharp to plaintiff and returned them  
24 to Sharp; (2) defendant violated his First Amendment right to  
25 access the courts when it failed to provide free postage for legal  
26 mailings to an indigent inmate; (3) defendant violated plaintiff's  
27 First Amendment right to access the courts when it failed to  
28 provide him access to a law library, including during a period when

1 he was "pro se"; and (4) defendant violated his First Amendment  
2 right to access the courts when it failed to provide a free notary  
3 to an indigent inmate. Sec. Am. Compl. at pp. 8-9. Plaintiff  
4 seeks injunctive relief and damages, as well as attorney's fees and  
5 costs. Id. at pp. 9-10.

6 In a Supplemental Complaint filed July 1, 2009, plaintiff  
7 withdraws his claims for injunctive relief and reiterates, without  
8 apparently adding any new claims, that he continues to assert that  
9 the jail's "mail rules" resulted in delays in the legal process  
10 adding unnecessary, additional time in jail. Supp'l Compl. at pp.  
11 1-2.

12 Initially, I recommend that defendant's motion as to the  
13 claims regarding the law library, the free notary, and the postage  
14 for legal mail, be granted and that plaintiff's motion as to these  
15 claims, be denied. In response to defendant's Concise Statement of  
16 Facts, plaintiff admits that at no time did he request access to a  
17 law library when he was pro se and unrepresented by counsel.  
18 Because the only time plaintiff was denied law library access was  
19 when he had an attorney, he has no cognizable claim for violation  
20 of his constitutional right to access the courts. See United  
21 States v. Wilson, 690 F.2d 1267, 1272 (9th Cir. 1982) (the offer of  
22 court-appointed counsel satisfies the constitutional obligation to  
23 provide meaningful access to the courts, even where detainee is  
24 denied pretrial access to a law library); see also Lewis v. Casey,  
25 518 U.S. 343, 350-51, (1996) (prisoners have no per se right to a  
26 law library).

27 As to the notary, the record shows, and plaintiff fails to  
28 dispute, that he had funds in his commissary account at the time he

1 requested a free notary, and that he was told he could bring a  
2 notary in at any time. Thus, the factual basis for plaintiff's  
3 claim that he was denied a notary when he was indigent, is not  
4 supported by the record.

5 Additionally, plaintiff fails to establish, or create a  
6 genuine issue of material fact regarding, an actual injury as a  
7 result of defendant's denial of his free notary request. See  
8 Casey, 518 U.S. at 349-51 (claim of denial of access to the courts  
9 must allege an actual injury); Barren v. Harrington, 152 F.3d 1193,  
10 1195 (9th Cir. 1998) (to state a claim for denial of access to the  
11 courts, plaintiff must allege an actual injury). Actual injury  
12 means "actual prejudice with respect to contemplated or existing  
13 litigation, such as the inability to meet a filing deadline or  
14 present a claim." Casey, 518 U.S. at 348 (internal quotation  
15 omitted). Here, plaintiff presents no evidence of any actual  
16 injury caused by defendant's failure to provide a free notary.

17 As to the claim that defendant violated his right of access to  
18 the courts by not providing free postage for legal mailings to an  
19 indigent inmate, defendant asserts that there is no evidence that  
20 such postage was denied to plaintiff while he was indigent. In  
21 response, plaintiff fails to submit any evidence of defendant's  
22 rejection of postage for legal mail at any time, whether he was  
23 indigent or not. Additionally, as with the notary, he fails to  
24 establish any kind of actual injury.

25 The remaining claim requires more discussion. Plaintiff  
26 argues that defendant's failure to deliver the "legally important  
27 mail" sent to him by Sharp violated his First Amendment rights. It  
28 is unclear if plaintiff views defendant's conduct as a violation of

1 his right of access to the courts, or his right to free expression.  
2 Because plaintiff considers the documents sent to him by Sharp to  
3 be "legally important" material, he suggests that his claim is  
4 based on his constitutional right to access the courts.

5 However, in his materials filed in opposition to defendant's  
6 motion, and filed in support of his own motion, plaintiff refers to  
7 the First Amendment rights of Sharp, the sender of the material.  
8 This suggests that a more general right of free expression is at  
9 issue. While plaintiff may not assert a claim based on a violation  
10 of Sharp's First Amendment rights, plaintiff may nonetheless bring  
11 a free expression claim on his own behalf related to receiving  
12 mail.

13 Ordinarily, "a plaintiff may only bring a claim on his own  
14 behalf, and may not raise claims based on the rights of another  
15 party." Pony v. County of Los Angeles, 433 F.3d 1138, 1146 (9th  
16 Cir. 2006) (discussing standing requirements). However, as the  
17 Ninth Circuit noted in Morrison v. Hall, 261 F.3d 896, 906 (9th  
18 Cir. 2001), the "Supreme Court has repeatedly recognized that  
19 restrictions on the delivery of mail burden an inmate's ability to  
20 exercise his or her First Amendment rights." (citing Procunier v.  
21 Martinez, 416 U.S. 396 (1974), Thornburgh v. Abbott, 490 U.S. 401  
22 (1989)). Thus, I consider the claim as implicating plaintiff's  
23 free expression rights as well as his right to access the courts.

24 To the extent plaintiff argues that defendant violated his  
25 right of access to the courts, he fails to establish his claim, or  
26 create an issue of material fact precluding the entry of summary  
27 judgment to defendant on this claim. First, as noted above, he was  
28 represented by court-appointed counsel (to whom Sharp also sent the



1 documents) at the time, which is sufficient to provide plaintiff  
2 access to the courts.<sup>2</sup>

3 Second, he fails to show an actual injury. In his  
4 Supplemental Complaint, plaintiff contends that the jail's mail  
5 rules in effect in the summer of 2007 resulted in "delays in the  
6 legal process and an innocent man spending additional time in  
7 jail[.]" Supp'l Compl. at p. 2. In the summary judgment  
8 materials, however, plaintiff provides no evidence to support this  
9 allegation. The record shows that plaintiff and Sharp initially  
10 met in early July 2007. Sharp attempted to send the materials to  
11 plaintiff starting in mid- to late July through mid-August 2007.  
12 Exhs 1 to Mueller Declr. at pp. 1-6 (mail violation reports dated  
13 July 24, 2007, July 25, 2007, August 1, 2007, August 10, 2007,  
14 August 17, 2007, and August 19, 2007). Plaintiff then received the  
15 materials himself in late August, after Delsman provided them to  
16 the jail, and the jail provided them to plaintiff.

17 Plaintiff provides no evidence of any actual injury occurring  
18 because of, at most, an approximate six-week delay in obtaining the  
19 documents Sharp attempted to mail him directly in July and August.  
20 Thus, his claim fails to the extent he alleges that the  
21 confiscation of the documents Sharp mailed to him violate his right  
22

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23  
24 <sup>2</sup> To the extent plaintiff suggests that Delsman's refusal  
25 to work with Sharp or to use Sharp's investigative research  
26 materials rendered Delsman ineffective, such a claim must be  
27 raised in the state criminal proceedings, or in a collateral  
28 attack on any conviction resulting from the alleged ineffective  
assistance of counsel, but not in a civil rights complaint in  
federal court. See Younger v. Harris, 401 U.S. 37, 44-46 (1971)  
(discussing longstanding public policy against federal court  
interference with state court proceedings).

1 of access to the courts.

2 To the extent plaintiff contends that defendant's conduct  
3 violates plaintiff's right to free expression, the jail's mail  
4 rules are governed by the analysis set forth in Turner v. Safley,  
5 482 U.S. 78, 89 (1987), which provides that "when a prison  
6 regulation impinges on inmates' constitutional rights, the  
7 regulation is valid if it is reasonably related to legitimate  
8 penological interest." Specifically, the analysis sets forth four  
9 factors to consider: (1) the presence of a "valid, rational  
10 connection between the prison regulation and the legitimate  
11 governmental interest put forward to justify it"; (2) whether there  
12 are alternative avenues that remain open to the inmates to exercise  
13 the right; (3) the impact that accommodating the asserted right  
14 will have on other guards and prisoners, and on the allocation of  
15 prison resources; and (4) whether the existence of easy and obvious  
16 alternatives indicates that the regulation is an exaggerated  
17 response by prison officials. Id. at 90 (internal quotation  
18 omitted); see also Thornburgh, 490 U.S. at 414-19 (applying Turner  
19 analysis to claim challenging rule prohibiting receipt of  
20 subscription publications by federal prisoners).

21 Defendant asserts that as to the documents which referred to  
22 plaintiff's victim, the jail has a legitimate penological interest  
23 in protecting victims and their families from harm and/or unwanted  
24 communications. The documents themselves are not in the record.  
25 In his undisputed Concise Statement of Facts, plaintiff generally  
26 describes the documents as sworn affidavits from witnesses, caselaw  
27 authority, and other court filings. Pltf's CSF at ¶¶ 15, 16; see  
28 also Pltf's Declr. at pp. 2-3 (same). The mail violation report

1 forms indicate that the mail mentioned the victim's name, contained  
2 a picture of the victim, or were considered other documents "from  
3 or concerning victim." Exh. 1 to Mueller Declr. at pp. 1, 2, 3, 5,  
4 6.

5 Although Sharp submitted a declaration indicating that the  
6 photo he mailed was not of plaintiff's victim, but was of Sharp's  
7 ex-wife, there is no dispute that at the time the mail was  
8 rejected, the jail believed the photo was of plaintiff's victim.  
9 Additionally, while Sharp describes the other documents concerning  
10 plaintiff's victim as official documents obtained from the victim's  
11 own criminal files at Linn County Circuit Court, he does not deny  
12 that these documents did relate to plaintiff's victim.

13 Courts have frequently found that protecting a criminal  
14 defendant's victims from harassment is a legitimate penological  
15 goal. E.g., Samford v. Drekte, 562 F.3d 674, 680 (5th Cir. 2009)  
16 (prisons have legitimate interest in protecting crime victims and  
17 their families from unwanted communications from prisoners); see  
18 also Tompkins v. Department of Corrections, No. 1:08CV322-01-MU,  
19 2009 WL 995573, at \*1 (W.D.N.C. Apr. 14, 2009) (prison had  
20 legitimate penological interest in protecting the public from  
21 harassment by inmates by prohibiting an inmate from sending letters  
22 to persons who indicate in writing that they do not wish to receive  
23 mail from a particular inmate).

24 While most cases address policies governing outgoing mail, the  
25 penological interest remains even when the regulation concerns  
26 incoming mail. See, e.g., Barhite v. Caruso, No. 1:08-cv-1138, 2009  
27 WL 440682, at \*3 (W.D. Mich. Feb. 23, 2009) (confiscation of photos  
28 from inmate which may have been brought to prison by inmate or

1 mailed to him once incarcerated, was reasonably related to  
2 legitimate penological interest of prison in protecting victims  
3 when inmate had been convicted of criminal sexual conduct and  
4 refused to state that the photos were not of his victims).

5 Here, plaintiff was charged with kidnaping, raping, and  
6 assaulting his victim. Exh. 1 to Goff Declr. at pp. 2-3.  
7 Defendant had a legitimate penological interest in restricting  
8 information about the victim, or what it thought were photos of the  
9 victim, from plaintiff because such information could in turn cause  
10 harassment or harm to the victim by plaintiff. Additionally,  
11 because the documents in this case were confiscated only when  
12 plaintiff was represented by counsel, alternative avenues existed  
13 for plaintiff to obtain the material from his lawyer.<sup>3</sup> While there  
14 would be little impact on guards, other inmates, or prison  
15 resources to accommodate the asserted right, this is only one  
16 factor to consider. Finally, here, the easy and obvious  
17 alternative of allowing the inmate's counsel to provide the inmate  
18 with the victim-related material does not expose the regulation as  
19 an exaggerated response by prison officials but rather, assures  
20 that the victim-related material relates to the inmate's legal  
21 proceedings which then fosters the legitimate use of the material  
22 and stems any use which is harassing to the victim.

23 Defendant also argues that as all of the documents were  
24 "legally important" according to plaintiff, defendant has  
25

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26 <sup>3</sup> Given the fact that defendant confiscated the material  
27 only when plaintiff had court-appointed counsel, I do not  
28 consider whether the rule prohibiting incoming mail concerning  
the inmate's victim is valid when the inmate is not represented  
by counsel.

1 legitimate penological interests in insuring that inmates who are  
2 represented by counsel correspond directly with their counsel to  
3 assist in their defense so as to maintain relationships between  
4 inmates and their counsel. Defendant cites to no case recognizing  
5 such an interest by a prison. The only authority cited by  
6 defendant is Guajardo v. Estelle, 580 F.2d 748 (5th Cir. 1978), a  
7 case in which, according to defendant, the court prohibited  
8 prisoners from receiving legal materials from outsiders other than  
9 publishers or publication suppliers where suitable alternatives are  
10 available.

11 Defendant's description of the holding in the case is  
12 misleading and exaggerated.<sup>4</sup> The Guajardo court addressed several  
13 regulations regarding inmate mail, one of which was a rule  
14 permitting the prison to inspect mail to and from an inmate's  
15 attorney for the presence of contraband and to determine that the  
16 incoming correspondence was from a licensed attorney. Id. at 757.  
17 The Fifth Circuit held that there was no "justification whatsoever"  
18 for opening or reading correspondence addressed by the inmate to  
19 courts, prosecuting attorneys, parole or probation officers, and  
20 identifiable attorneys. Id. at 758. It noted that the content of  
21 outgoing mail to such persons could not, "except on the most  
22 speculative theory," damage the security interests of jail  
23 administration. Id. As to incoming mail from an attorney, the  
24 court approved of the part of the rule allowing such mail to be  
25 opened and inspected for contraband in the presence of the inmate.

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26  
27 <sup>4</sup> Additionally, defendant fails to note that Guajardo was  
28 decided before Turner and thus relies on a superseded analysis  
for evaluating the reasonableness of prison regulations.

1 Id. at 757.

2 Two other regulations concerned publications. Under the first  
3 of these two regulations, the prison censored manuals providing  
4 descriptions of the manufacture of weapons, explosives, or drugs,  
5 and "publications judicially declared obscene." Id. at 760. These  
6 regulations authorized censorship of statements that "'unduly  
7 complain' or 'magnify grievances', [as well as the] expression of  
8 'inflammatory political, racial, religious or other views,' and  
9 matter deemed 'defamatory' or 'otherwise inappropriate.'" Id. at  
10 761.

11 The court upheld the rule to the extent that the publication  
12 contained information regarding the manufacture of explosives,  
13 weapons, or drugs, or that a "reasonable person would construe as  
14 written solely for the purpose of communicating information  
15 designed to achieve the break down of prisons through inmate  
16 disruption such as strikes or riots." Id. The court held the rule  
17 invalid to the extent it allowed censorship of publications that  
18 "advocate the legitimate use of prison grievance procedures or that  
19 urge prisoners to contact public representatives about prison  
20 conditions." Id.

21 The second of the two publication-related regulations allowed  
22 inmates to receive publications only from a publisher or a  
23 publications supplier. Id. at 762. The court upheld the rule  
24 because permitting inmates to receive books from friends or  
25 relatives created security risks. Id. The court then also noted  
26 that in regard to legal material, any infringement on the right of  
27 access to the courts was "sufficiently alleviate[d]" by the  
28 defendant institution's willingness to include bookstores as

1 suppliers of publications and its provision of a prison law  
2 library. Id.

3 The Guajardo court said nothing about a prison's interest in  
4 fostering or maintaining the relationship between an inmate and his  
5 or her counsel. It did not, contrary to defendant's assertion,  
6 indicate that a prison could lawfully restrict "legal materials"  
7 sent by non-publishers. Its holding was clearly limited to the  
8 sending of legal publications such as books and manuals to inmates.  
9 The court did not address the sending by non-attorneys of non-  
10 publication legal materials.

11 Defendant cites to no other authority in support of its  
12 position that it has a legitimate penological interest in  
13 maintaining the relationship between an inmate and counsel. I have  
14 found none. Moreover, I cannot, in the absence of authority,  
15 understand what legitimate penological interest a prison would  
16 possibly have in fostering the attorney-inmate relationship.  
17 Prisons have many legitimate concerns, but whether an inmate has a  
18 relationship with a lawyer, or a particular lawyer, is not one of  
19 them. I reject defendant's unsupported assertion that it has a  
20 legitimate penological interest in maintaining an inmate's  
21 relationship with counsel. Thus, I need not proceed further with  
22 the remaining factors of the Turner analysis. Defendant's former  
23 regulation as to the non-victim-related materials in this case,  
24 violated plaintiff's First Amendment free expression rights.

25 Although, to sustain his access to the courts claim, plaintiff  
26 has to show actual prejudice to existing or contemplated litigation  
27 to establish the particular type of actual harm required by Casey,  
28 that actual prejudice is not required for his free expression

1 claim. Plaintiff has sufficiently created an issue of material  
2 fact on damages related to this claim by stating in his declaration  
3 that he desired the information from Sharp in order to decide  
4 whether to accept a plea offer or go to trial, and whether to  
5 replace or keep Delsman, Pltf's Declr. at p. 3, and by arguing that  
6 he suffered harm from being in "limbo" as a result of this "'black-  
7 out' of information" from Sharp. Nonetheless, plaintiff fails to  
8 put forth evidence capable of establishing his requested \$20,000 in  
9 damages for this claim. Thus, at this point, I recommend granting  
10 plaintiff's motion only as to the liability portion of his free  
11 expression First Amendment claim, and only as to the non-victim  
12 related documents, and denying his motion as to the damages he  
13 seeks on this claim.

14 Finally, defendant moves to strike several statements made by  
15 plaintiff in his declaration and made by Sharp in his declaration.  
16 I deny the motion to strike as moot as I did not consider or rely  
17 on any of the challenged statements in resolving the motions.

#### 18 CONCLUSION

19 I recommend that defendant's motion for summary judgment (#36)  
20 be granted as to all claims except for the portion of the free  
21 expression First Amendment claim related to non-victim documents,  
22 and that defendant's motion be denied as to all aspects of that  
23 claim. I further recommend that plaintiff's motion for summary  
24 judgment (#43) be denied as to all claims, except for the liability  
25 portion of his non-victim-related free expression First Amendment  
26 claim, and that the motion be denied as to the damages requested on  
27 that claim. Defendant's motion to strike (#50) is denied as moot.

28 / / /



SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due June 14, 2010. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due July 1, 2010. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

IT IS SO ORDERED.

Dated this 25th day of May, 2010.

/s/ Dennis James Hubel  
Dennis James Hubel  
United States Magistrate Judge